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C O N F I D E N T I A L SECTION 01 OF 02 THE HAGUE 002792

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DEPARTMENT FOR S/WCI - PROSPER/RICHARD, EUR - STEPHENS,  
EUR/SCE - GAUDIOSI/GREGORIAN/MITCHELL, L/EUR - LAHNE, L/AF  
- GTAFT. INR/WCAD - SEIDENSTRICKER/MORIN; USUN FOR  
ROSTOW/WILLSON

E.O. 12958: DECL: FIVE YEARS AFTER ICTY CLOSURE

TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)

SUBJECT: ICTY - MILOSEVIC REGAINS SOME CONTROL OVER DEFENSE  
CASE; ASSIGNED COUNSEL REQUESTS RESIGNATION

REF: THE HAGUE 2736

Classified By: Clifton M. Johnson, Legal Counselor, Reason 1.5(b)-(d).

1. (C) Summary. The trial of Slobodan Milosevic before the International Criminal Tribunal for the former Yugoslavia (ICTY) was recessed again because of a lack of witnesses during the week of October 24, but that did not stop the case from making news. In particular, Steven Kay, imposed defense counsel, submitted a request to the Registrar to remove him from the case on October 26. His letter stressed his inability to adequately represent Milosevic due to the accused's noncooperation and urged that he and his associate Gillian Higgins be taken off the case. Kay's departure would leave the trial, yet again, in disarray. The appeals chamber issued today (see septel) an opinion affirming the imposition of counsel on the accused but finding that the trial chamber erred in failing "to recognize that any restrictions on Milosevic's right to represent himself must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial". This balanced decision may well prompt Milosevic to reengage the proceedings and assigned counsel to reconsider their resignation. Meanwhile, a new list of 140 "priority" defense witnesses has been submitted to the trial chamber and includes both former President Clinton and former Secretary Albright. In the absence of available witnesses, however, the trial is on hiatus until November 9. End summary.

2. (SBU) Defense counsel Steven Kay, joined by his co-counsel Gillian Higgins, submitted a request to the Registrar on October 26 to withdraw as Milosevic's defense counsel. (NB: Under Tribunal directives, the Registrar has responsibility for the selection and withdrawal of counsel. In this case, however, the Registrar will follow the lead of the chambers, as the request was referred on October 27 to the trial chamber.) The 12 page resignation letter, which reads like a legal brief, says that "the Accused has consistently refused to see us or to speak with us," "has not provided any instructions," and "will not co-operate in any way with us as the Assigned Counsel or as standby counsel." In the absence of guidance from the Accused, "counsel cannot know the nature and substance of their client's defence and cannot therefore fulfill their obligation to present that defence." The letter concludes that assigned counsel "are now under an obligation to seek withdrawal from our role as Assigned Counsel as it is plain that we are no longer able to function without breaching the terms of our Code of Conduct at the ICTY."

3. (C) As reported reftel, a five-judge panel of the appeals chamber, led by ICTY president Theodor Meron, heard arguments on October 21 in Milosevic's interlocutory appeal of the trial chamber's assignment of defense counsel. The decision today vigorously affirms the trial court's decision to impose counsel but finds that the trial court committed "a fundamental error of law" in failing to make the modalities of the imposition proportional to the interests being protected. As detailed septel, it therefore reverses the trial court order on the modalities and leaves it to the trial court to "steer a careful course between allowing Milosevic to exercise his fundamental right of self-representation and safeguarding the Tribunal's basic interest in a reasonably expeditious resolution of the cases before it." In light of this decision, which will give Milosevic a new opportunity to reengage the proceedings, it is unclear whether Kay and Higgins will withdraw their resignation request. In any event, because the defense has no witnesses ready to testify, the trial has been adjourned until November 9. Meanwhile, Kay and Higgins continue in their roles as counsel.

4. (C) Separately, Embassy legal officers have learned from the Registry liaison officer (RLO) to the accused (protect) that Milosevic and his legal associate, Zdenko Tomanovic, provided Kay with a priority list of 140 names from Milosevic's original witness list. The list comprises individuals who are relevant to the Kosovo phase of the defense, and it includes two American officials -- former President Clinton and former Secretary Albright. (NB:

Milosevic's request to the USG for testimony of USG officials in May 2004, through the RLO, also included former Secretaries Christopher and Cohen and Wesley Clark. These

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three are not on a current priority list, and Kay is said to believe that Clark could not be called as a defense witness in any event, since he appeared for the prosecution in December 2003.) It is from this list of 140 that Kay is expected to begin seeking subpoenas, though not, at least in the initial phases, for governmental witnesses. Meanwhile, Milosevic provided the RLO with specific grounds for his interest in the testimony of a range of potential witnesses, including the USG officials, all of which has been provided to Kay. The RLO, despite the current uncertainties related to defense counsel, continues to engage with counsel and brief Milosevic on the conduct of the counsel's work.

15. (C) Comment: The appeals decision sensibly restores some balance to the approach taken by the trial court in imposing counsel. But whether it is too late to make a difference depends on the reaction of the assigned counsel which in turn depends on the reaction of the Accused. If the resignation request was primarily a tactical effort to influence the appeals chamber as it decided Milosevic's appeal regarding the assignment of counsel, then we would expect Kay and Higgins to stay on given that the decision gives Milosevic greater latitude in the conduct of his defense. If, however, the request reflected a genuine desire to leave the proceedings or if, in spite of the decision, Milosevic does not reengage the proceedings, then we would expect Kay and Higgins to depart. This would be a further significant blow for a defense phase that is already teetering, and would likely see the case limp to a close by year's end. As has been the case throughout much of these proceedings, Milosevic remains in the drivers seat and will once again set their course. End comment.

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